No. 22A_____

IN THE SUPREME COURT OF THE UNITED STATES

GREGORY SHIELDS,

Applicant,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

To the Honorable Brett M. Kavanaugh, Associate Justice of the United States Supreme Court and Circuit Justice for the United States Court of Appeals for the Sixth Circuit:

Pursuant to Rule 13.5 of the Rules of this Court, Gregory Shields respectfully requests a 58-day extension of time, until Friday, November 11, 2022, within which to file a petition for a writ of certiorari. The Supreme Court of Kentucky denied Mr. Shields' timely petition for rehearing on June 16, 2022. Unless extended, the time for filing a petition for a writ of certiorari will expire on September 14, 2022. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1257.

In support of this request, Applicant states as follows:

1. This case concerns the admissibility at trial of testimony offered at a preliminary hearing when the declarant is unavailable to testify. The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court held that out-of-court testimonial statements are admissible at criminal trials only when the declarant is "unavailable to testify" and "the defendant had an adequate opportunity to cross-examine." *Id.* at 54, 57. This case presents the question of when, if ever, a preliminary hearing provides an "adequate opportunity" for cross-examination under the Confrontation Clause.

Applicant Gregory Shields lived with and cared for his uncle and aunt, Samuel and Maude Murrell. Op. 2. In February 2017, police responded to a report that Mr.

Murrell had been murdered at his home. *Id.* Mrs. Murrell told the police two versions of events that day. *Id.* She first claimed that an unknown intruder killed Mr. Murrell. *Id.* Mrs. Murrell later accused Mr. Shields of killing Mr. Murrell. *Id.* Officers arrested Mr. Shields and charged him with murder. *Id.*

One week later, Mr. Shields appeared for a preliminary hearing with appointed counsel. *Id.* Under Kentucky law, "the sole purpose of a preliminary hearing . . . is to determine whether there is probable cause to believe that the defendant committed a felony." *Commonwealth v. Wortman*, 929 S.W.2d 199, 200 (Ky. App. 1996). Mrs. Murrell was among the witnesses the Commonwealth called at the preliminary hearing. Op. 2. Mr. Shields had received no previous discovery from the Commonwealth, and the Commonwealth gave no notice that Mrs. Murrell would testify. Op. 6.

Mrs. Murrell, then 82 years old, testified briefly on direct examination. Op. 2. According to her testimony, the incident began when Mr. Shields entered the Murrells' bedroom "yelling and complaining" about various grievances. Op. 2-3. She alleged that Mr. Shields cut Mr. Murrell on his wrist and chest with knives. *Id.* Mrs. Murrell stated that, after the initial altercation, she and Mr. Shields went to smoke in the garage together until Mr. Murrell asked for help changing the bedsheets. Op. 3. Finally, she testified that, as she and Mr. Shields treated Mr. Murrell's wounds, he fell twice, hit his head, and later died. *Id.*

Defense counsel cross-examined Mrs. Murrell in an abbreviated manner. Op. 32 (Keller, J., dissenting). Counsel asked Mrs. Murrell only six perfunctory questions

"primarily . . . elicit[ing] background evidence" on the Murrells' relationship with Mr. Shields and "barely touch[ing] on the facts of the underlying incident." Op. 31.

Mrs. Murrell died 16 months later, before Mr. Shields' trial. Op. 5. Prior to her death, the Commonwealth never sought to depose Mrs. Murrell as contemplated by Kentucky's rules of criminal procedure. *See* Ky. R. Crim. P. 7.10.

2. Before trial, Mr. Shields moved to exclude Mrs. Murrell's preliminary hearing testimony under the Confrontation Clause. Op. 5-6. The trial court denied his motion, and Mr. Shields entered a conditional guilty plea to first-degree manslaughter. Op. 8.

A divided Supreme Court of Kentucky affirmed 4-to-3. Op. 1-31. The majority concluded that, although the Confrontation Clause required that a defendant have had a prior opportunity to cross examine an unavailable declarant, a "less-searching probable cause hearing" would satisfy that requirement. Op. 24. And it held that Mr. Shields had an adequate opportunity to cross-examine Mrs. Murrell. Op. 1, 25-31. The court afforded "little weight" to defense counsel's inability to prepare for cross-examination based on the lack of notice and lack of discovery. Op. 25. Instead, the court focused on counsel's purported failure to request a continuance or to task more probing questions. *Id.* The court reasoned that defense counsel's questioning was "self-limited," because "the defense did not advance any cross-examination which the trial court disallowed," and it found no abuse of discretion in the trial court's determination that the questions defense counsel would have asked Mrs. Murrell if counsel were "cross-examining Mrs. Murrell with full knowledge that her testimony

was being preserved for trial" were adequate. Op. 25-26. The court concluded that the "circumstances cannot be viewed as denying the defense the opportunity to confront the witness." Op. 25.

Justice Keller, joined by Justices Conley and Nickell, dissented. Op. 31-47. In her view, "a preliminary hearing will *almost never* provide a defendant with an adequate opportunity to cross-examine a witness to satisfy the Confrontation Clause." Op. 32. As she explained, the "'only purpose' of a preliminary hearing in Kentucky," as in many States, "is to determine whether there is sufficient evidence to justify detaining the defendant in jail or under bond until the grand jury has an opportunity to act on the charges." Op. 38. She stressed that the resulting differences in the scope of the proceedings, the burden, and the procedural and substantive rules are "impossible to overemphasize." Op. 40-41.

"Under the majority's interpretation of the Confrontation Clause," Justice Keller worried, "the scope and tenor preliminary hearings" will have to change dramatically if they are to "provide the defendant an adequate opportunity to confront the witnesses against him." Op. 42. "The preliminary hearing will turn into a miniature trial" and "expend time and resources the judiciary does not have." *Id.* "Best practices, and even the provision of minimally effective representation, will require that defense counsel's cross-examination of witnesses be extensive and thorough." *Id.* And trial courts, in turn, will be forced to choose "between adhering to the limited scope of the preliminary hearing" or "providing a forum for cross-examination" that is sufficient to serve the purposes of the Confrontation Clause. *Id.* at 43.

Justice Keller warned that the majority's decision "assigns defense counsel an impossible task." *Id.* at 32. She observed that, under Kentucky law, a "preliminary hearing must take place within ten days of a defendant's initial appearance if he is in custody" and she worried that "[c]onducting sufficient investigation to cross-examine a witness as one would prepare for trial, especially without discovery provided by the Commonwealth, is practical impossible within that short time period." *Id.* On the other hand, seeking a continuance would mean extending the defendant's custody and potentially forgoing a preliminary hearing altogether, if the State determines to proceed with the grand jury in the interim. Op. 44-45. In Justice Keller's view, "[t]his cannot be what the framers of our Constitution intended." Op. 32.

3. The Supreme Court of Kentucky's interpretation of the Confrontation Clause implicates a conflict among state courts of last resort on the admissibility of preliminary hearing testimony by an unavailable declarant at a subsequent trial. At one end of the conflict, some courts, including the Supreme Court of Colorado, have determined that a preliminary hearing never provides an adequate opportunity to cross-examine sufficient to satisfy the Confrontation Clause requirements. *See People v. Fry*, 92 P.3d 970, 978 (Colo. 2004). It explained that "credibility is not at issue" at a preliminary hearing "and probable cause is a low standard," so once "a prima facie case for probable cause is established, there is little defense counsel can do to show that probable cause does not exist." *Id.* The court declined to "change the scope of the preliminary hearing" to "prevent[] the preliminary hearing from becoming a mini-trial which would expend time and resources the judiciary does not possess." *Id.*

Thus, given the nature and purpose of a preliminary hearing, the court reaffirmed that a "preliminary hearing does not provide an adequate opportunity to cross-examine sufficient to satisfy the Confrontation Clause requirements." *Id.*

At the other end of the conflict, courts hold that the Confrontation Clause is satisfied when a defendant has the mere opportunity to cross examine at a preliminary hearing, without regard to circumstances that diminish the adequacy of that opportunity. For example, the Supreme Court of Utah holds that preliminary hearing testimony is always admissible at trial as long as a defendant had the opportunity to cross-examine at the preliminary hearing. *See Mackin v. State*, 387 P.3d 986, 999 (Utah 2016). These courts reasons that the Confrontation Clause "guarantees only 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.* (citation omitted); *see State v. Hannon*, 703 N.W.2d 498, 508 (Minn. 2005) (holding that preliminary hearing testimony is always admissible at trial).

Other jurisdictions fall somewhere in the middle. *See, e.g.*, *State v. Nofoa*, 349 P.3d 327, 340 (Haw. 2015) (explaining that adequacy of cross-examination at a preliminary hearing turns on "1) the motive and purpose of the cross-examination, 2) whether any restrictions were placed on [defendant's] cross-examination during the preliminary hearing, and 3) whether [the defendant] had access to sufficient discovery at the preliminary hearing to allow for effective cross-examination"); *People v. Torres*, 962 N.E.2d 919, 932 (Ill. 2012) (identifying "pertinent consideration[s]" for evaluating whether a preliminary hearing provided an adequate opportunity for

cross-examination, including whether the defendant had the benefit of "unlimited cross-examination" and "what counsel knows while conducting the cross-examination"); *State v. Estrella*, 893 A.2d 348, 359 (Conn. 2006) (explaining that the adequacy of cross-examine at a preliminary hearing depends, in part, on whether the defendant was permitted to cross-examine "on matters affecting [the witness's] reliability and credibility"). This Court's guidance on the question presented is sorely needed.

This case, moreover, presents an ideal vehicle to provide that guidance and resolve the conflict. Mr. Shields properly preserved his constitutional objection to the testimony at issue. *See* Op. at 5-6. The "sole question" presented to the Supreme Court of Kentucky was "whether testimony taken at a preliminary hearing may be used as evidence at trial when the witness is unavailable due to her death." Op. 1. The majority and the dissent each considered extensively the question and relevant precedents of this Court, reaching conflicting conclusions. And neither decision suggested any alternative ground on which Mr. Shields' conviction could be affirmed.

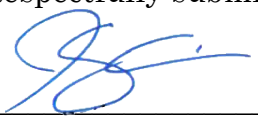
4. Mr. Shields respectfully requests an extension of time to prepare and file a petition for a writ of certiorari, seeking review of the Supreme Court of Kentucky's decision in this case. Mr. Shields' undersigned appellate counsel were recently retained, following the Kentucky Supreme Court's decision. And counsel have been heavily engaged with other matters and have several other pending deadlines and commitments that would make the existing deadline difficult to meet, including a brief filed in the Fourth Circuit on July 19; a brief filed in the Fourth Circuit on July 21; a brief filed in the Fourth Circuit on August 2; a brief filed in this Court on

August 12; a brief to be filed in the New York Appellate Division on September 6; oral argument in the Fourth Circuit on September 13; a brief to be filed in the Third Circuit on September 23; a brief to be filed in the Florida Court of Appeals on September 30; a brief to be filed in the Fourth Circuit on October 11; a brief to be filed in the Sixth Circuit on October 11; and a brief to be filed in the Eleventh Circuit on October 12. The requested extension would allow counsel to continue to research the relevant legal issues and to prepare a petition that appropriately addresses the important issue raised by this case.

Accordingly, Mr. Shields respectfully requests an extension to file a petition for a writ of certiorari to and including November 11, 2022.

Date: August 30, 2022

Respectfully submitted,



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